No. 04-473

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GIL GARCETTI, *et al.*,
Petitioners,

v.

RICHARD CEBALLOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a deputy district attorney's speech about a pending criminal case is protected by the First Amendment as speech by a citizen on a matter of public concern.

2. Whether the government's interest in promoting the efficiency of the work of a district attorney's office outweighs a deputy district attorney's interest in disclosing to defense counsel his conclusions and opinions about the prosecution's evidence.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. CEBALLOS'S SPEECH ABOUT THE *CUSKEY* CASE WAS NOT PROTECTED BY THE FIRST AMENDMENT BECAUSE HE WAS SPEAKING AS A MEMBER OF A PROSECUTION TEAM, NOT AS A CITIZEN	11
II. THE GOVERNMENT'S INTEREST IN PROMOTING THE EFFICIENCY OF THE WORK OF THE DISTRICT ATTORNEY'S OFFICE OUTWEIGHED CEBALLOS'S INTEREST IN DISCLOSING TO DEFENSE COUNSEL HIS CONCLUSIONS AND OPINIONS ABOUT PROSECUTION EVIDENCE	17
CONCLUSION	28

TABLE OF AUTHORITIES

Cases — Page

Brady v. Maryland, 373 U.S. 83 (1963) ..... *passim*
Connick v. Myers, 461 U.S. 138 (1983)..... *passim*
Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992)..... 2
Hickman v. Taylor, 329 U.S. 495 (1947)..... 20, 22
Hobbs v. Municipal Court, 233 Cal. App.3d 670 (4th Dist. 1991), *overruled on other grounds, People v. Tillis*, 18 Cal.4th 285 (1998)..... 19-20
Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980)..... 16
McAuliffe v. Mayor of New Bedford, 155 Mass. 216 (1892)..... 11
Pickering v. Board of Educ., 391 U.S. 563 (1968)..... *passim*
Rankin v. McPherson, 483 U.S. 378 (1987).....2, 18, 26
Roland v. Superior Court, 124 Cal. App. 4th 154 (3d Dist. 2004).....19, 20, 23
United States v. Bagley, 473 U.S. 667 (1985) 15
United States v. Brown, 628 F.2d 471 (5th Cir. 1980)..... 15
United States v. Nobles, 422 U.S. 225 (1975).... 15, 22-23, 23
United States v. White, 970 F.2d 328 (7th Cir. 1992).....9-10, 15
Waters v. Churchill, 511 U.S. 661 (1994) 17, 27
Williams v. Justice Court, 230 Cal. App. 2d (Cal. App. 3d Dist. 1964)..... 4

Statutes

Cal. Civ. Proc. Code § 2018(c).....10, 19, 20
Cal. Penal Code § 1054.1(e) 21
§ 1054.1(f)..... 20
§ 1054.6.....10, 19, 20, 26

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in protecting "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

While *amici* fully respect the constitutional right of their employees "as . . . citizen[s] in commenting upon matters of public concern," *id.*, that is not what occurred here. All of the speech for which respondent Richard Ceballos now claims First Amendment protection was engaged in as a member of a team of attorneys prosecuting a criminal case.

During that prosecution Ceballos concluded that the DA's office had an obligation to disclose to the defense not only potentially exculpatory evidence but also his own conclusions and opinions about the prosecution's evidence—in particular a key affidavit—even though attorney conclusions and opinions are privileged under the California work product doctrine. Ceballos openly disagreed with his supervisors, petitioners Frank Sundstedt and Carol Najera, about the scope of the office's disclosure obligations. By his own account, he unilaterally "informed defense counsel that he believed the affidavit contained false statements," Resp. Br. in Opp. 5, and "refused" to follow Najera's express instructions about the manner in which potentially exculpatory evidence should be disclosed. *Id.*

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[1] The parties have consented to the filing of this *amicus curiae* brief and their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

None of the speech for which Ceballos claims First Amendment protection was engaged in as a citizen. Rather, it was solely that of a Deputy District Attorney, engaged in the duties of his office. Those duties included following the instructions of his supervisors, particularly where, as here, both Sundstedt and Najera consistently treated Ceballos's beliefs about the veracity of prosecution evidence with utmost gravity, and their decisions and instructions to him were in full accord with federal and state law.

As this Court has noted, "it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors." *Connick v. Myers*, 461 U.S. 138, 151 (1983) (internal quotations and citation omitted). By Ceballos's own account, his speech as a Deputy District Attorney "impair[ed] discipline by superiors [and] harmony among co-workers" and "interfere[d] with the regular operation" of the DA's office. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Because of the importance of these issues to the effective operation of a core function of state and local governments, *amici* respectfully submit this brief to assist the Court in its resolution of this case.

STATEMENT OF THE CASE

Respondent Richard Ceballos has been a Deputy District Attorney in the Los Angeles County District Attorney's Office since 1989. *See* Resp. Br. in Opposition ("Opp.") 3.[2] In 1997 or 1998, two or three years before the events that

[2] Because he is opposing petitioners' motion for summary judgment, the facts must be viewed in the light most favorable to Ceballos. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992). Much of the material in this statement is therefore taken from the statement in Ceballos's brief in opposition to the petition for certiorari, Opp. 3-6.

gave rise to this case, Ceballos was assigned to the Pomona Branch of the DA's office. *See id.* "[A]bout a year later," he "was promoted to calendar deputy, a prestigious position affording him supervisory responsibility over more junior Deputy District Attorneys." *Id.*

In early 2000, Ceballos was contacted by defense counsel representing one of the defendants in *People v. Cuskey*, a case being prosecuted by a Deputy District Attorney under Ceballos's supervision. *See id.* Defense counsel "asked [Ceballos] to investigate whether one of the arresting Deputy Sheriffs had lied in an affidavit he swore out to obtain a search warrant." *Id.* "Ceballos agreed to look into it." *Id.*

Ceballos "review[ed] the evidence, visit[ed] the crime scene, . . . discuss[ed] the matter with colleagues in [the District Attorney's] office," and met "with his direct supervisor, Carol Najera, and her superior, Head Deputy District Attorney Frank Sundstedt." *Id.* As a result of his investigation, "Ceballos determined that the affidavit was indeed false and misleading." *Id.* His "colleagues and supervisors agreed [with Ceballos] that the validity of the warrant was questionable." *Id.*

"On March 2, 2000, Ceballos provided Sundstedt a memorandum, or disposition report, discussing his assessment that the Deputy Sheriff had relied on inaccurate and misleading information provided by other officers and falsified his affidavit. . . ." *Id.* at 3-4. In his disposition memorandum "Ceballos recommended [to Sundstedt] that the case be dismissed." *Id.* at 4. Ceballos's March 2 memorandum also informed Sundstedt that "[a] motion to traverse [the] search warrant has been filed and is set for hearing on March 6, 2000."[3] J.A. 496. The defense motion, by Ceballos's

[3] The hearing on the motion to traverse was actually held on March 20. *See* J.A. 198. A motion to traverse is a pre-trial proceeding that affords criminal defendants an opportunity to contest the seizure of evidence by,

account, "allege[d] that the affiant . . . deputy sheriff . . . made statements or omissions of fact in the search warrant 'that were deliberately false or in reckless disregard of the truth.'" *Id.*

Ceballos's March 2 disposition memorandum "minced no words" in setting forth his opinion about the truthfulness of the affiant Deputy Sheriff—Ceballos flatly "accused the Deputy Sheriff of having committed perjury." Opp. 4. In addition, Ceballos's disposition memorandum "charged misconduct" both "on the part of the affiant [Deputy Sheriff] and other law enforcement officers." *Id.*[4]

Petitioner Frank Sundstedt "treated the [memo] as exceptional." *Id.* at 4. Sundstedt "directed Ceballos to revise the memorandum and make it less accusatory of the Deputy

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inter alia, "challeng[ing] the truth of the factual contents of the affidavits" on which search warrants are based. *Williams v. Justice Court*, 230 Cal. App. 2d 87, 97-98 (3d Dist. 1964). *See id.* at 96 (defendant "who 'controverts'" the grounds of a search warrant "may do so . . . by traversing the truth of the search warrant affidavit").

[4] At the hearing on petitioners' motion for summary judgment, the district court made several findings about Ceballos's March 2 disposition memorandum based on the representations and admissions of Ceballos's attorney. For example, Ceballos's lawyer admitted "that a 'disposition memo,' which is what Ceballos prepared on March 2, 2000 is common" in the District Attorney's office. Pet. App. 64a. "Indeed," the court added, Ceballos "admits that it was 'pursuant to his duties as a prosecutor . . . [that] he wrote the memo expressing his concerns about the veracity of the officers in this case.'" *Id.* (citing Plaintiff's Statement of Genuine Issues, ¶ 4). The district court further noted that "[i]n a commendable display of candor, [Ceballos's] counsel reiterated that admission at the hearing." *Id.*

The court also found that in the disposition memorandum "Ceballos requested 'permission to dismiss the information [i.e., the charges] against defendants'" and that Ceballos thus "obviously recognized that he needed Sundstedt's permission to [dismiss the charges], which reinforces the conclusion that the memorandum was prepared as part of his job." Pet. App. 64a-65a n.5.

Sheriff, particularly because the memorandum was to be shared with the Sheriff's Department." *Id.*[5]

Ceballos prepared another memorandum to Sundstedt on March 6, 2000. *See id.* In this memorandum Ceballos "report[ed] a conversation [he] had had with the Deputy Sheriff, in which Ceballos told the Deputy that statements in his affidavit appeared to be 'grossly inaccurate.'" *Id.* (citation omitted). Ceballos's March 2 disposition memorandum, "if not both memoranda," *id.*, "were faxed to the Sheriff's Department." *Id.*

On March 9, 2000, there was a meeting "attended by several representatives from the Sheriff's Department, Sundstedt, Najera, Ceballos, and the Deputy District Attorney originally assigned to the *Cuskey* case." *Id.* Everyone present had a copy of Ceballos's March 2 disposition memorandum. *See id.* This memorandum, which had been "revised" to make it "less accusatory," *id.*, contained Ceballos's "conclusions that the Deputy Sheriff's characterizations of the crime scene in his affidavit were 'grossly inaccurate,' 'clearly misleading,' omitted key facts, and 'quite possibly, were wholly fabricated.'" *Id.* (citation omitted).

During the meeting "representatives from the Sheriff's Department verbally attacked Ceballos, accused him of acting like a 'public defender,' and demanded that he be removed from the case." *Id.* "The captain in the Sheriff's Department also wanted the case to go forward because he was fearful that one of the defendants would file a lawsuit against the Department." *Id.* at 4-5.

At the time of the March 9 meeting, the defense motion to traverse was shortly to be heard in the trial court. *See* Pet. App. 54a-55a (dist. ct. op.). "Following the meeting with the

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[5] Ceballos's revised March 2, 2000, memorandum is reproduced at J.A. 495-502.

Sheriff's Department, Sundstedt decided to proceed with the case pending the outcome" of the motion to traverse. Opp. 5. Ceballos then "informed defense counsel that he believed the affidavit contained false statements, and the defense subpoenaed him to testify at the hearing on their motion." *Id.*

Ceballos also "told [respondent] Carol Najera, his supervisor, that pursuant to *Brady v. Maryland*, he was required to turn over to the defense" his March 2 disposition memorandum and his March 6 memorandum to Sundstedt, the two memos "he had written expressing his opinion regarding the illegality of the search warrant." *Id.* Najera "instructed him to write a new memorandum that contained only the statements of the Deputy Sheriff who had prepared the affidavit and to omit all other information." *Id.* Ceballos also alleged that Najera "made a veiled threat of retaliation if Ceballos testified candidly" at the hearing. *Id.*

In response to Najera's express instruction, "Ceballos refused to write a new memorandum." *Id.* He indicated his willingness, however, "to provide copies" of the memos "to the defense with work product redacted." *Id.*

Less than two weeks later, on March 20, the hearing on the defense motion to traverse was held. *See* J.A. 198-363. Prior to the hearing, the trial court read all the documents relevant to the motion, including "the search warrant and affidavit and attachments." *Id.* at 203. At the hearing defense counsel reiterated that the purpose of the motion was:

> to hear the evidence regarding whether the issues and material involved in the affidavit were true, in fact, or misstatement [sic] or omissions. I'm asking that [Sheriff's] Deputies be called to testify, to bring in evidence that, in fact, material in the affidavit was not correct, was, in fact, false, and there was [sic] some material omissions.

J.A. 203. The defense called as witnesses the two Deputy Sheriffs who conducted the investigation at the crime scene,

the Deputy Sheriff who prepared the affidavit that supported the search warrant application, and Ceballos. *See* J.A. 199.

Ceballos testified about the conversations he had with the Deputy Sheriff who prepared the affidavit, *see id.* at 296-307, and further testified that he had not had any conversations with the two officers who investigated the crime scene. *Id.* at 307. The Prosecution, represented by petitioner Najera, did not object to Ceballos's testimony about the statements made to him by the officer who prepared the affidavit, *see id.* at 296-97, but did object to any testimony by Ceballos that was not "based upon a statement made by the officer." *Id.* at 298, 300. This objection was sustained by the trial court. *See id.* at 300. The trial court also sustained the Prosecution's objections to Ceballos's testimony about his "impressions" of the crime scene based on his visit to it "a few days" before the hearing and seven months after the search was executed. *Id.*[6]

At the conclusion of the hearing, the trial court denied the motion. J.A. 352. In support of its ruling, the trial court analyzed a variety of evidence offered in support of the search warrant. *See id.* at 348-52. The court found no basis in any of the testimony to conclude that any officer involved in the *Cuskey* search had committed perjury. *See id.* The court held that given the evidence presented to the magistrate

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[6] The police investigation of the crime scene that was the basis for the search warrant affidavit was conducted on August 3, 1999. *See* J.A. 213-14. The trial court sustained the Prosecution's objection to Ceballos's testimony as to (in the words of defense counsel) "the condition of the roadway and whether or not, *in his opinion*, tracks could be—I know he's no expert, but he can testify as to the condition of the roadway." *Id.* at 286 (emphasis added). In regard to Ceballos's proposed testimony about the crime scene, the trial court observed, "But how does Deputy D.A. Ceballos' testimony assist the court . . . if he made observations a few days ago and this affidavit was based on observations in August of '99?" J.A. 288.

who issued the search warrant, "I don't see what other conclusion a magistrate would come to." *Id.* at 351. The court further ruled that even if the magistrate had disregarded all of the statements in the affidavit whose truthfulness Ceballos disputed, the magistrate still had an adequate evidentiary basis to issue the search warrant. *See id.* 351-52. Subsequently one defendant was convicted at trial and one pled guilty to criminal charges.[7]

SUMMARY OF ARGUMENT

Ceballos's First Amendment right, as a government employee, to speak "as a citizen . . . upon matters of public concern," *Connick v. Myers*, 461 U.S. 138, 140 (1983), was not violated for two reasons.

First, when Ceballos provided his March 2 disposition memorandum and March 6 memorandum to defense counsel and testified at the hearing on defendant's motion to traverse, he was not speaking "as a citizen." Rather, Ceballos was speaking as a member of a prosecution team pursuant to the Due Process obligation of the District Attorney's office to disclose potentially exculpatory evidence to the defense. *See Brady v. Maryland*, 373 U.S. 83 (1963).

Although Ceballos was mistaken about the scope of the disclosure obligation created by *Brady*, he admitted to his immediate supervisor, petitioner Najera, that it was only "pursuant to *Brady v. Maryland*, [that] he was required to turn over to the defense the two memoranda he had written expressing his opinion regarding the illegality of the search warrant." Opp. 5. As the district court correctly noted, Ceballos prepared his March 2 disposition memorandum "as

[7] The opinion of the district court states that two of the three *Cuskey* defendants pled guilty but this includes one defendant who pled guilty and served a sentence prior to the hearing on the motion to traverse. *See* J.A. 200-01, 361-62 (discussing presence at hearing of defendant Ojala).

part of his job," Pet. App. 65a n.5, a characterization equally true of his March 6 memorandum regarding the discussions he had had with the Deputy Sheriff who prepared the affidavit, and his testimony at the hearing on the motion to traverse. Because all of Ceballos's speech in this case was engaged in strictly pursuant to what he and his supervisors believed to be the Due Process obligations of the District Attorney's office, he was not speaking "as a citizen" and his First Amendment rights were not implicated.

Second, even if the Court concludes that Ceballos has satisfied the first part of the two-step analysis of *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *id.* at 568, clearly outweighs Ceballos's "interests . . . as a citizen in commenting upon matters of public concern." *Id.*

The undisputed facts demonstrate that Ceballos's concern that a perjured affidavit provided the basis for the search warrant was treated with the utmost seriousness by his supervisors from the moment he raised the matter. *See* Opp. 4 ("Sundstedt treated [Ceballos's March 2 disposition memorandum] as exceptional, as if Ceballos's accusations raised a 'novel issue.'"); *see also id.* at 5 (Najera instructed Ceballos to write an evidentiary memorandum for submission to the defense containing "the statements of the Deputy Sheriff who had prepared the affidavit" that Ceballos had collected during his investigation).

The manner in which Ceballos's supervisors, petitioners Sundstedt and Najera, directed him were in full accord with the Due Process obligations of the District Attorney's office to disclose exculpatory evidence. *Brady* is limited to evidence as opposed to a prosecutor's opinions or assessment of evidence, and the *Brady* doctrine requires the disclosure only of such evidence as is unavailable to the defense "by the exercise of reasonable diligence." *United States v. White*, 970

F.2d 328, 337 (7th Cir. 1992). It thus does not apply to any of Ceballos's observations of, or conclusions about, the crime scene searched by the officers in *Cuskey*.

Ceballos also unilaterally sought to compromise the protections provided to prosecutors' "impressions, conclusions, [and] opinions" by California's work product doctrine. *See* Cal. Penal Code § 1054.6 (incorporating by reference Cal. Civ. Proc. Code § 2018(c)). Ceballos's attempt to disregard petitioner Najera's legally correct instructions not to disclose the DA office's work product constituted insubordination that fully warranted disciplinary measures.

The interest of the District Attorney's office "in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568, clearly outweighed Ceballos's desire to inform the defense, without his supervisors' authorization, of "his opinion regarding the illegality of the search warrant." Opp. 5. Indeed, Ceballos had no legitimate interest in disclosing to defense counsel his opinions or conclusions, thereby compromising the DA's work product privilege. As the Court held in *Connick*, "discipline and morale in the workplace are related to an agency's efficient performance of its duties." 461 U.S. at 148.

In *Connick* the Court did "not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* at 152. The decisions made and instructions given to Ceballos by his two supervisors, petitioners Sundstedt and Najera, were in full conformity with federal law that mandates the disclosure of exculpatory evidence, and state law that protects attorney work product from disclosure. These laws governed not only Ceballos's actions as a Deputy DA but the work of the office as a whole.

Because of the necessarily close working relationship between the DA's office and law enforcement officers, the instructions given to Ceballos were also essential to "promot[e] the efficiency of the public services [the DA's office] performs through its employees." *Pickering*, 391 U.S. at 568. So, too, were the personnel decisions allegedly taken with respect to Ceballos, *see* Opp. 5, that he claims were "retaliatory" but fell well short of termination. *See id.* The judgment of the court of appeals should accordingly be reversed.

ARGUMENT

I. CEBALLOS'S SPEECH ABOUT THE *CUSKEY* CASE WAS NOT PROTECTED BY THE FIRST AMENDMENT BECAUSE HE WAS SPEAKING AS A MEMBER OF A PROSECUTION TEAM, NOT AS A CITIZEN

This Court's landmark decision in *Pickering* established that public employees do not surrender their First Amendment right to speak as citizens on matters of public concern merely because they have accepted public employment. The foundation for *Pickering* and later public employee speech cases is the Court's rejection of the view, articulated by Justice Holmes while on the Supreme Judicial Court of Massachusetts, that "[A] policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892), *quoted in Connick v. Myers*, 461 U.S. 138, 143-44 (1983). Until the early 1950's "Holmes' epigram expressed this Court's law." *Id.* at 144 (collecting cases). Since *Pickering*, however, the Court's "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Id.* at 147.

The public employee speech doctrine evolved in the 1950's and 1960's in a series of cases in which the Court held it impermissible "to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated." *Id.* at 144. These cases struck down oaths denying past affiliation with the Communist Party, denials of employment based on "previous membership in a particular party," and statutes that barred employment based on membership in allegedly "'subversive' organizations." *See id.* (collecting cases). As *Connick* explained,

> In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive."

Id. at 144-45.

"At the same time," the *Pickering* Court recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S. at 568. The issue in each case, the Court held, "is to arrive at a balance between the interests of the [employee], *as a citizen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (emphasis added).

As *Connick* makes clear, "[t]he repeated emphasis in *Pickering* on the right of a public employee, 'as a citizen, in commenting upon matters of public concern,' was not accidental." 461 U.S. at 143. This point, reaffirmed in later cases, "reflects both the historical evolvement of the rights of

public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* (footnote omitted).

The principles on which *Pickering* is grounded are illustrated by the facts of that case. Pickering was a teacher in Will County, Illinois. He was fired by the Board of Education "for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools." 391 U.S. at 564. Pickering's letter to the newspaper was written and published during a protracted public debate over the appropriate level and method of financing schools in the district that was triggered by a series of ballot issues.

Pickering's letter followed the publication in the same newspaper of a letter by the superintendent of schools that warned of the adverse consequences of inadequate funding. *See id.* at 566. The superintendent's letter "was published in the paper two days before the election [on a sizeable school bond issue] and submitted to the voters in mimeographed form the following day." *Id.* It followed the publication in the same newspaper of "a variety of articles attributed to the District 205 Teachers' Organization" likewise urging passage of the bond issue. *Id.*

It was in this context that Pickering wrote his letter to the newspaper criticizing the School Board's management of school finances, and for which he was terminated. The fact that Pickering's speech was made "as a citizen" is manifest from the text of his letter, which is an appendix to the Court's opinion. *See id.* 575-78. In the concluding paragraph, for example, Pickering wrote, "I must sign this letter *as a citizen*, taxpayer and voter, *not as a teacher*." *Id.* at 578 (emphasis added).

The Court held that Pickering's First Amendment right to speak "as a citizen" on a matter of public concern had been violated by his termination for publishing a letter unrelated to his duties as a teacher. *See id.* at 574-75. It nonetheless took pains to emphasize several important facts that are readily distinguishable from this case.

First, the statements for which Pickering was terminated were "in no way directed towards any person with whom [he] would normally be in contact in the course of his daily work as a teacher." *Id.* at 569-70. "Thus," the Court noted, "*no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here.*" *Id.* at 570 (emphasis added). Equally important, in *Pickering* and altogether unlike this case, Pickering's "employment relationships with the Board [of Education] and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.*

In short, the speech for which Pickering was terminated was classic political speech that was an integral part of an ongoing public debate about a school financing ballot issue. It was therefore paradigmatic speech engaged in "as a citizen." It was also clear that Pickering's termination was the direct result of his publication of a letter to the editor on this issue.

In this case, by contrast, all of Ceballos's speech about the *Cuskey* case was engaged in as one member of a team of government prosecutors and as a representative of the DA's office, not as a citizen. For example, by his own account of the facts, he "told Carol Najera, his supervisor, that pursuant to *Brady v. Maryland*, he was required to turn over to the defense" his March 2 case disposition memorandum. Opp. 5. As the federal district court found based on Ceballos's admissions, disposition memoranda were "common" in the

DA's office, Pet. App. 64a, and the March 2 memo "was prepared as part of [Ceballos's] job." *Id.* at 64a-65a n.5. Ceballos told Najera that *Brady* likewise required him to produce to the defense his March 6 memorandum to Sundstedt. *See* Opp. 5.[8]

Similarly, as part of his investigation of defense counsel's allegation that the Deputy Sheriff's affidavit contained perjured testimony, Ceballos visited the crime scene seven months after the execution of the search. *See* J.A. 300-01; Opp. 3. Ceballos's observations of the crime scene were not subject to disclosure under *Brady*, however, because prosecutors are not required to disclose evidence to which "the defendant has access . . . by the exercise of reasonable diligence." *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992) (citing *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980)). All of Ceballos's observations of the crime scene were equally available to defense counsel or their investigators "by the exercise of reasonable diligence." *Id.*

In addition, Ceballos interviewed the affiant Deputy Sheriff about the contents of his affidavit. *See* J.A. 296-300. He also "review[ed] the evidence," "discuss[ed] the matter with colleagues in his office," and met "with his direct supervisor, Carol Najera, and her superior, Head Deputy District Attorney Frank Sundstedt." Opp. 3.

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[8] As discussed below at pp. 20-23, Ceballos was mistaken in his view that the *Brady* doctrine required him to divulge to the defense "his opinion regarding the illegality of the search warrant." Opp. 5. While *Brady* and its progeny require the disclosure of exculpatory evidence not available to the defense, the Court has never held that a prosecutor is required to turn over anything other than evidence. "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 675 (1985) (footnote omitted). *See also United States v. Nobles*, 422 U.S. 225, 231, 236-38 & n.12 (1975).

Ceballos's investigation of the veracity of the Deputy Sheriff's affidavit—an investigation triggered by a request from defense counsel, *see id.*—was important, but it was an integral part of the work of a lawyer in a prosecutor's office. This is equally true of Ceballos's two memoranda to Head Deputy District Attorney Sundstedt based on his investigation. *See* Pet. App. 64a (dist. ct. op.) (Ceballos "admits that it was 'pursuant to his duties as a prosecutor . . . [that] he wrote the [March 2] memo expressing his concerns about the veracity of the officers in this case.'") (quoting Plaintiff's Statement of Genuine Issues ¶ 4). Likewise, Ceballos's testimony at the March 20 hearing on the motion to traverse was an obligation of the DA's office to the extent it concerned potentially exculpatory evidence whose disclosure was required by the *Brady* doctrine, *see* J.A. 295, but exceeded the bounds of *Brady* insofar as Ceballos wished to testify about his own observations, opinions, and interpretation of evidence. *See, e.g.*, J.A. 57 (Ceballos dep.).

In contrast to Pickering's speech "as a citizen," Ceballos engaged in all of the speech for which he now claims First Amendment protection in his capacity as a Deputy District Attorney and as a member of a team of prosecuting attorneys and representative of the DA's office. Likewise, to the extent that there was a *Brady* obligation to produce potentially exculpatory *evidence* to the defense—an obligation that Ceballos admits that his immediate supervisor, petitioner Najera, instructed him to carry out, *see* Opp. 5—this was an obligation of the DA's office. If, for example, Ceballos had been incapacitated and unable to provide *Brady* evidence in the office's files to the defense, that would not have obviated the Due Process obligation of the District Attorney's office to produce such evidence. *See Martinez v. Wainwright*, 621 F.2d 184, 186 (5th Cir. 1980) (under *Brady*, "the duty to produce requested evidence falls on the State").

Because all of the speech for which Ceballos now claims First Amendment protection was engaged in solely in his capacity as one member of a prosecution team and pursuant to what Ceballos understood, rightly or wrongly, to be the Due Process obligations of that office, the speech was not protected by the *Pickering/Connick* line of employee speech cases. The judgment of the court of appeals according First Amendment protection to Ceballos's speech should therefore be reversed.

II. THE GOVERNMENT'S INTEREST IN PROMOTING THE EFFICIENCY OF THE WORK OF THE DISTRICT ATTORNEY'S OFFICE OUTWEIGHED CEBALLOS'S INTEREST IN DISCLOSING TO DEFENSE COUNSEL HIS CONCLUSIONS AND OPINIONS ABOUT PROSECUTION EVIDENCE

Even if the Court concludes that Ceballos has satisfied the first part of the two-step analysis of *Connick* and *Pickering*, under the balancing of interests that then follows "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568, outweighs Ceballos's "interests . . . as a citizen, in commenting upon matters of public concern." *Id.*

In balancing an employee's First Amendment-protected interests in speech against the employer's needs to carry out its public mission, the Court has repeatedly recognized "the practical realities of government employment, and the many situations in which . . . most observers would agree that the government must be able to restrict its employees' speech." *Waters v. Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion). The Court has "given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Id.* at 673.

In determining whether the employer's interests in efficient and effective operation of a government agency outweigh the employee's interest in speech, the Court has recognized "pertinent considerations" to include

> whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.
>
> These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.

Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73).

Even when viewed in the light most favorable to Ceballos, the record demonstrates that his belief that a perjured affidavit had been used to obtain the search warrant in *Cuskey* was treated with utmost gravity by his supervisors from the outset. Ceballos concedes that the head of the office, petitioner Sundstedt, regarded Ceballos's March 2 disposition memorandum "as exceptional, as if Ceballos's accusations raised a 'novel issue.'" Opp. 4.

On March 6, Ceballos submitted a second memorandum to Sundstedt in which he reported that he had "told the Deputy [Sheriff who prepared the affidavit] that statements in his affidavit appeared to be 'grossly inaccurate.'" *Id.* (citation omitted). Then, by Ceballos's own account, "[t]he March 2 memorandum, if not both memoranda, were faxed to the Sheriff's Department." *Id.* (citation omitted). As noted

above, Ceballos's March 2 memorandum contained his highly opinionated beliefs that the Deputy Sheriff's characterizations of the crime scene were 'grossly inaccurate,' 'clearly misleading,' omitted key facts, and 'quite possibly were wholly fabricated.'" *Id.* (citation omitted).

Three days after Ceballos submitted his second memorandum, Ceballos acknowledges that "a meeting was held . . . [that was] attended by several representatives from the Sheriff's Department, Sundstedt, Najera, Ceballos, and the Deputy District Attorney originally assigned to the *Cuskey* case." *Id.* (citing Pet. App. 3a). In view of the fact that defense counsel had already filed a motion to traverse that was shortly to be decided in the state trial court, Sundstedt, who did not agree with Ceballos's conclusion, "decided to proceed with the case pending the outcome of a defense motion challenging the basis for the search warrant." *Id.* at 5 (citing Pet. App. 3a-4a). *See also* J.A. 116-18 (Sundstedt dep.); *id.* at 117 ("After the meeting occurred, I was not convinced like Richard was convinced.").

Thereafter, notwithstanding Sundstedt's decision as head of the office to allow the court to determine the validity of the warrant and the underlying affidavit, "Ceballos informed defense counsel that *he believed* the affidavit contained false statements." *Id.* (emphasis added). Naturally enough, "the defense subpoenaed [Ceballos] to testify at the hearing on their motion" to traverse. *Id.* (citing Pet. App. 4a).

Ceballos also sought to compromise the protections provided to prosecutors' "impressions, conclusions, [and] opinions" by California's work product doctrine. *See* Cal. Penal Code § 1054.6 (incorporating by reference Cal. Civ. Proc. Code § 2018(c)); *see also Roland v. Superior Court*, 124 Cal. App. 4th 154, 169 (3d Dist. 2004) ("'To the extent that a report of a witness interview reflects an attorney's mental processes, it is exempted from discovery by section 1054.6.'") (quoting *Hobbs v. Municipal Court*, 233 Cal. App.

3d [illegible] (4th Dist. 1991), *overruled on other grounds, People v. Hillis*, 18 Cal. 4th 285 (1998)).[9] Ceballos was thus mistaken when he "told Carol Najera, his supervisor, that pursuant to *Brady v. Maryland*, he was required to turn over to the defense the two memoranda he had written [to Sundstedt] expressing *his opinion regarding the illegality of the search warrant*." Opp. 5 (emphasis added).

In response, petitioner Najera acted to preserve the DA office's work product protections in the face of Ceballos's unilateral and unauthorized efforts to waive them. She "instructed him to write a new memorandum that contained only the statements of the Deputy Sheriff and to omit all other information." But Ceballos point blank "refused" (*id.*) to follow Najera's unambiguous and legally correct instruction.[10]

[9] These provisions of California law, expressly applicable to prosecutors, provide: "Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." Cal. Civ. Proc. Code § 2018(c) (incorporated by reference in Cal. Penal Code § 1054.6). These statutes were in force throughout the period covered by this case and remain in effect until July 1, 2005, when they will be replaced by substantially identical work product protections.

Unlike the *Brady* doctrine, the work product doctrine is not grounded in the federal Constitution. In California it is based on common law (including this Court's decision in *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947), as well as state case law), Proposition 115 (adopted by the people of California in 1990 and part of the state Constitution), and subsequently enacted statutes. The history of the California work product doctrine in criminal cases is set forth in *Hobbs*. *See* 233 Cal. App. 3d at 690-95 (collecting cases and other authorities).

[10] *See Roland*, 124 Cal. App. 4th at 169 ("statements or reports that merely reflect what an intended witness said during an interview are not work product"); *see also* Cal. Penal Code § 1054.1(f) (mandating disclosure by prosecution of "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial").

Rather than following the instructions of his supervisor, Ceballos told her that he was willing to "provide copies of his memoranda to the defense with work product redacted." *Id.*[11] *See* J.A. 54-58 (Ceballos dep.) As Ceballos readily testified in his deposition, "I finally told her, 'Carol, you have your opinion; I have mine. *But you need to know that if I'm asked my opinion when I'm up on the stand about what I believe happened in this case, I will state that I believe these deputies lied on this warrant.*" *Id.* at 57 (emphasis added).

Ceballos's refusal to follow his supervisor's instruction on a matter central to the office's strategy in a criminal prosecution was insubordination, pure and simple. It is all the more disturbing since Najera's instruction to him was correct as a matter of law. Moreover, the protections provided to prosecutors' work product by California law belong to the DA's *office*, not to a single attorney such as Ceballos, who was only one member of a prosecution team working on the *Cuskey* case. Ceballos was thus not only insubordinate but was acting beyond his authority when he attempted to disclose the DA office's work product contrary to the direct instructions of his supervisor.

While the prosecution's *Brady* obligation to disclose exculpatory evidence arises from a constitutional imperative, *see* 373 U.S. at 86-87; *see also* Cal. Penal Code § 1054.1(e) (mandating disclosure by prosecution of "[a]ny exculpatory evidence"), the policies that underlie the work product

[11] *Amici* respectfully submit that beyond Ceballos's insubordination in disputing his supervisor's clear instruction, there is a qualitative difference between a memorandum written in order to comply with the *Brady* obligations of the DA's office, which Najera instructed Ceballos to prepare, and "redacted" versions of the internal case disposition memos that Ceballos had earlier written to the office head. In any event, the decision as to the manner in which the DA's office should comply with its *Brady* obligations rested with Ceballos's supervisors, not with Ceballos.

doctrine are also compelling. As this Court explained in the landmark case of *Hickman v. Taylor*,

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that [the lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, *memoranda*, correspondence, briefs, *mental impressions*, *personal beliefs*, and countless other tangible and intangible ways—aptly though roughly termed . . . the "Work product of the lawyer."

329 U.S. 495, 510-11 (1947) (internal citation omitted) (emphasis added).

Equally important, the *Hickman* Court emphasized the corrosive consequences were attorney work product not protected from discovery. "[M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." *Id.* at 511.[12]

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[12] It is unclear whether Ceballos's openly expressed views on the veracity of the *Cuskey* affidavit inadvertently gave rise to the sort of "sharp practices" on the part of opposing counsel that the Court foresaw in *Hickman*. It is, of course, customary for both prosecution and defense to employ their own investigators to assist in factual development of cases for trial. *See, e.g., United States v. Nobles*, 422 U.S. at 227 ("an investigator for the defense" was employed by counsel to "interview. . . witnesses and preserve[] the essence of those conversations in a written report"); *Roland*, 124 Cal. App. 4th at 155 (issue in case was whether applicable California discovery rule "covers a defense investigator's 'raw written notes' of a witness's statements") (citation omitted).

Amici in no way question Ceballos's good faith in acting upon what he perceived to be his obligation to disclose exculpatory evidence to the defense. Ceballos had no obligation under *Brady*, however, to report to the defense his observations of a freely accessible crime scene. In this connection it is noteworthy that Ceballos was the only supporting witness called by the defense at the hearing on the motion, the three other witnesses being the two officers who initially investigated the crime scene and the officer who prepared the disputed affidavit. *See generally* J.A. 199, 207 *et seq.*

While *Hickman* was a civil case, the work product doctrine is fully applicable in criminal cases. Indeed, as this Court emphasized in *Nobles*, "[a]lthough the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." 422 U.S. at 238. In criminal as in civil cases, the work product doctrine is essential because "[a]t its core, [it] shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Id.*

The centrality of the work product doctrine to the efficient and effective operation of a large District Attorney's office such as the Pomona branch of the Los Angeles County DA's office is illustrated by the facts of this case. The prosecution of the *Cuskey* case was a team effort and Ceballos was just one member of that team. At the time Ceballos was contacted by defense counsel about the disputed affidavit, the case was being prosecuted by the Deputy District Attorney "originally assigned to the . . . case," Opp. 4, who was working "under Ceballos's supervision." *Id.* at 3. Ceballos, in turn, had

his own "direct supervisor," petitioner Najera, *id.*, and responsibility for all cases in the office rested with petitioner Sundstedt, the Head Deputy District Attorney for the Pomona branch office. *Id.* Each of these attorneys, as well as the law enforcement officers in the Sheriff's Department with whom they worked, were involved in the prosecution of the *Cuskey* case.

After Ceballos had been asked by defense counsel to investigate the veracity of the affidavit, Ceballos, by his own account, "review[ed] the evidence, visit[ed] the crime scene, . . . *discuss[ed] the matter with colleagues in his office*" and met "with his direct supervisor, Carol Najera, and her superior, Frank Sundstedt." *Id.* (emphasis added). Ceballos admits that his head supervisor, Sundstedt, immediately took steps to pursue the matter. *Id.*

Ceballos thereafter prepared his March 2 disposition memorandum to Sundstedt, in which he "discuss[ed] his assessment" of the affidavit's veracity and "*recommended* that the case be dismissed." *Id.* at 3-4 (emphasis added). As the federal district court noted, Ceballos "obviously recognized that he needed Sundstedt's permission" to dismiss the case, Pet. App. 64a n.5, *i.e.*, that it was not a decision that he was empowered to make but rather a decision that rested with the head attorney in the Pomona office, petitioner Sundstedt.

Following a subsequent meeting "attended by several representatives from the Sheriff's Department, Sundstedt, Najera, Ceballos, and the Deputy District Attorney originally assigned to the. . . case," Opp. 4, Sundstedt decided not to follow Ceballos's recommendation to dismiss the case but instead "to proceed with the case pending the outcome of" the motion to traverse. *Id.* at 5. Notwithstanding Sundstedt's decision to let the trial court determine the validity of the warrant and the underlying affidavit—a decision that Ceballos fully understood was Sundstedt's to make, *see id.* at

3-4—Ceballos thereafter "informed defense counsel that *he believed the affidavit contained false statements*, and the defense subpoenaed him to testify at the hearing on their motion." *Id.* at 5. (emphasis added). After the defense motion to traverse the warrant was denied, one defendant was convicted at trial and one pled guilty. *See* Pet. App. 55a (opinion of district court).[13]

Amici do not doubt that Ceballos was utterly convinced that he was correct about the untruthfulness of the affidavit. Nevertheless, a team effort was involved in every aspect of the *Cuskey* prosecution and Ceballos repeatedly refused to defer to the decisions and instructions of his supervisors, who had ultimate responsibility for handling the *Cuskey* prosecution. By his own account Ceballos also "refused" to follow the legally correct instruction of his immediate supervisor, petitioner Najera, that he "write a new memorandum" for disclosure to the defense pursuant to *Brady* "that contained only the statements of the Deputy Sheriff who had prepared the affidavit and to omit all other information" contained in his highly "accusatory" memos to Sundstedt. *See* Opp. 4-5. He also states that he "minced no words" in his March 2 disposition memorandum, *id.* at 4, in which he "accused the Deputy Sheriff of having committed perjury." *Id.*

In deciding whether a public employee's right to speak on a matter of public concern has been violated by allegedly retaliatory personnel action, the Court must conclude that the employee's interests in speech outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. As this Court held in *Connick*, which also involved an Assistant District Attorney who claimed that

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[13] *See* p. 8 n.7, *supra* (a third defendant pled guilty prior to the motion to traverse).

she had been retaliated against for the exercise of First Amendment rights.

> The District Court was . . . correct to recognize that 'it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close relationships with their superiors.'. . . . When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.

461 U.S. at 151-52 (internal citation and footnote omitted). "Furthermore," the Court added in language directly applicable here, "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* at 152.

On one hand, Ceballos had no legitimate interest in communicating protected work product to defense counsel. The work product doctrine privilege belongs to the DA's office, *see* Cal. Penal Code § 1054.6, and Ceballos was not authorized to waive it.

On the other side of the balance, this Court has repeatedly recognized the importance in public employee speech cases of such factors as "whether the [speech] impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the [public employer's] enterprise." *Rankin*, 483 U.S. at 388 (citation omitted). This is especially true of a district attorney's office, in which actions such as Ceballos's can undermine the office's public credibility and its ability effectively to prosecute criminal cases.

Even when the facts are viewed in the light most favorable to Ceballos, it is clear that he "interfered with the efficient

functioning of the office," *id.* at 389, "disturbed or interrupted other employees," *id.*, and "discredited the office by making [his] statement[s]" both "in public," *id.*, *i.e.*, at the hearing on the motion to traverse, and by his unilateral communication to defense counsel about the veracity of the affidavit following Sundstedt's decision on March 9 not to dismiss the *Cuskey* prosecution pending resolution of the motion. *See* Opp. 5.[14]

In the words of the *Waters* plurality, "[g]overnment agencies are charged by law with doing particular tasks" and "[a]gencies hire employees to help do those tasks as effectively and efficiently as possible." 511 U.S. at 674-75. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 675. While the district court gave appropriate weight to these compelling state interests, the court of appeals erred in both its analysis of the facts and its interpretation of the law.

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[14] In *Connick* the Court ruled that the summary termination of an Assistant District Attorney did not violate the First Amendment. In this case, the personnel actions taken subsequent to Ceballos's actions disregarding the decisions and instructions of his supervisors were far milder. Indeed, while *amici* agree that these personnel actions were serious—as alleged by Ceballos, they included demotion from calendar deputy to trial deputy; a choice of remaining at the Pomona branch office and prosecuting misdemeanors or transferring to the El Monte branch if he wished to continue to handle felonies; and reassignment of his murder case, *see* Pet. App. 4a-5a—they were not "retaliatory." Under the facts as alleged by Ceballos, his conduct required firm responsive action by the District Attorney's office to maintain discipline and "'the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 140 (quoting *Pickering*, 391 U.S. at 368).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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